

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of	)	
	)	
Service Rules for the 746-764 and 776-794	)	
MHz Bands, and Revisions to Part 27 of the	)	WT Docket No. 99-168
Commission's Rules	)	
	)	
Carriage of the Transmissions of Digital	)	CS Docket No. 98-120
Television Broadcast Stations	)	
	)	
Review of the Commission's Rules and	)	
Policies Affecting the Conversion to Digital	)	MM Docket No. 00-39
Television	)	

To: The Commission

**COMMENTS OF USA BROADCASTING, INC.**

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August 16, 2000

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**COMMENTS OF USA BROADCASTING, INC.**

USA Broadcasting, Inc. ("USAB") respectfully submits these comments in response to the Further Notice of Proposed Rule Making ("FNPRM") in the above-captioned proceeding. 1/

**I. INTRODUCTION AND SUMMARY**

USAB is the broadcast licensee of eight analog stations that operate on Channels 60-69, including several stations located in the nation's largest Designated

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1/ See Memorandum Opinion and Order ("MO&O") and Further Notice of Proposed Rulemaking, FCC 00-224 (released June 30, 2000).

Market Areas. 2/ Consistent with the Commission's goal of promoting use of the UHF spectrum by new broadcast stations offering diverse programming and vibrant competition, 3/ USAB has invested very significant sums acquiring and converting its stations to fully programmed local outlets. These stations will soon provide over 50 million Americans with a variety of programming, from informational programming to sports to entertainment. In 1996 the Commission required USAB and all other broadcasters to invest in advancing a second Commission goal: that of creating a digital broadcast service. USAB has made, and has further plans to make, significant investments to facilitate that goal.

Now the Commission wishes to advance a third goal: making spectrum in the 700 MHz band available for new services. Voluntary band-clearing by Channel 59-69 broadcasters 4/ certainly cannot be undertaken lightly as it requires these stations, which rely on advertising revenues as their business model, to forego any meaningful over-the-air presence for the foreseeable future. This has significant short and long-

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2/ USAB is the licensee of the following stations with analog operations on Channel 60-69: WHSE-TV, Newark, NJ (Channel 68 – New York (1) DMA); WHSI-TV, Smithtown, NY (Channel 67 – New York (1) DMA); WEHS-TV, Aurora, IL (Channel 60 – Chicago (3) DMA); WHSP-TV, Vineland, NJ (Channel 65 – Philadelphia (4) DMA); WHSH-TV, Marlborough, MA (Channel 66 – Boston (6) DMA); KHSH-TV, Alvin, TX (Channel 67 – Houston (11) DMA); WQHS-TV, Cleveland, OH (Channel 61 – Cleveland (13) DMA); and WAMI-TV, Hollywood, FL (Channel 69 – Miami-Ft. Lauderdale (16) DMA). Additionally, WEHS-TV and WHSP-TV have been assigned Channel 59-69 digital allotments.

3/ See, generally, *Report and Order in the Matter of Improvements to UHF Television Reception*, 90 FCC 2d 1121 (1982); *Notice of Proposed Rule Making in the Matter of Table of Television Allotments*, 83 FCC 2d 51 (1980).

4/ 700 MHz wireless licensees must provide adjacent channel protection to broadcasters operating on Channel 59. Accordingly, the Commission will allow those broadcasters to enter into voluntary agreements that would expedite clearance of Channel 59 also. See MO&O at note 111.

term costs for broadcasters, including costs that are exacerbated by the uncertainty surrounding the DTV transition.

Nonetheless, USAB is open to working with the Commission and all interested parties in helping to achieve this new goal. While there is an inherent tension among the three goals, USAB believes that each of the Commission's objectives is more likely to be achieved, and can be achieved far more quickly, if the resolution is based on a coherent policy that recognizes the legitimate concerns and rights of UHF broadcasters. At a minimum, such a timely resolution requires that:

- 1) the Commission provide incumbent broadcasters and new wireless licensees broad flexibility to enter into voluntary, market-based spectrum clearing arrangements, and that the Commission reject any mandatory proposals for participation in the band clearing process;
- 2) the Commission clearly set and keep to expedited timetables for its administrative activities, from holding the auction to processing any necessary applications, including DTV applications; and
- 3) the Commission clearly and promptly address critical uncertainties that are slowing the digital transition, such as digital must-carry.

Adopting policies consistent with these three points will lead to the resolution of the many issues among the parties and the accomplishment of the Commission's three goals far more quickly than any other alternative. If, however, the Commission acts in a manner inconsistent with these points, long delays are inevitable. If policies are adopted which encourage the parties to game the regulatory system or that send a message of uncertainty as to the timing of certain key events, long delays will result and all three of the Commission goals will be in jeopardy. For example, delays in auction dates, or consideration of proposals that have no statutory legitimacy,

will not encourage the parties to engage in serious negotiations; in fact they will have the opposite effect and inevitably will delay the realization of all the Commission's goals.

USAB's investments in providing service in the UHF band already meet the Commission's historical public interest objective with respect to this spectrum. To the extent that the Commission now wishes to encourage the creation of a new digital broadcast service, and clear spectrum for new wireless services, the Commission needs to send a clear message consistent with the three requirements outlined above.

## **II. USAB HAS ADVANCED THE FCC'S GOALS FOR THE DEVELOPMENT OF THE UHF BAND BY CREATING VALUABLE BROADCAST SERVICES ON ITS STATIONS – VALUE WHICH WILL BE PUT AT SIGNIFICANT RISK BY EARLY MIGRATION FROM THE 700 MHZ BAND**

Consistent with longstanding FCC policy goals for the development of the upper-range UHF band -- spectrum once thought to be a no man's land of little value -- USAB has invested significant financial and human resources in its stations. A number of the stations air Home Shopping Network electronic retail programming, an early form of Interactive Television. 5/

USAB is in the process of converting its stations into fully programmed local outlets; four stations have been converted since June 1998, and preparations for launching additional USAB stations - with a considerable presence in the Channel 60-69 band - are well underway. For example, USAB's Miami station, WAMI-TV, has invested heavily in broadcasting relationships with two regional professional sports teams –

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5/ See generally, *Report and Order in the Matter of Improvements to UHF Television Reception*, 90 FCC 2d 1121 (1982); *Notice of Proposed Rule Making in the Matter of Table of Television Allotments*, 83 FCC 2d 51 (1980).

providing local fans with baseball and basketball games. The Dallas and Atlanta stations, launched less than one year ago, also have forged agreements with professional sports teams, and all four of the outlets, including the recently-launched Boston station, are investing in broadcasting deals with local college sports teams and/or regional leagues.

In addition to sports, USAB has committed itself to provide alternative information programming to local viewers. Since its launch in June of 1998, WAMI has spent millions of dollars to create a unique approach to television news programming by covering stories relevant to the local community with an intelligent and unique sensibility. USAB also produces original programming inspired by particular local markets for distribution across all its local outlets; this programming recently has proven to be as popular as most of the stations' acquired programming. USAB's local outlets also will broadcast programming that is currently limited to cable distribution in certain markets -- providing viewers without access to cable with original programming that they would otherwise be unable to watch. USAB also has invested millions of dollars in constructing a state-of-the-art production facility in Ontario, California, from which USAB is able to distribute programming in digital and analog formats to all its UHF stations.

USAB understands the Commission's desire to create a regulatory environment that would enable, if not encourage, incumbent Channel 59-69 broadcasters and prospective 700 MHz wireless licensees to reach agreements that will result in band clearance significantly prior to the Congressionally mandated deadline, which is not until conclusion of the DTV transition process. But USAB believes that any regulatory structure designed to incent early surrender of 700 MHz spectrum by

television broadcasters must take into account the significant competitive and economic risks facing broadcasters that elect to decommission their analog facilities significantly prior to the time when their competitors will be required to do so. These risks arise primarily because a large percentage -- nearly one third -- of American television viewers continue to receive television service by way of over-the-air signals. <sup>6/</sup> In the case of USAB's Channel 60-69 stations, nearly thirty percent of the population served by USAB stations rely exclusively on over-the-air analog service in order to receive broadcast signals. For some of USAB's stations, the percentage of viewers who rely exclusively on over-the-air analog service is even higher. For example, for USAB's Houston station, KSHH, which operates on analog Channel 67, fully 43 percent of the population relies on over-the-air signals to receive broadcast stations.

These numbers illustrate that the decision to cease analog operations and convert to digital ahead of the market -- *i.e.*, in advance of the industry-wide conversion date -- will have enormous economic repercussions for USAB and other incumbent channel 60-69 television licensees. The slower than expected speed at which consumers are acquiring digital reception equipment magnifies this problem because there is no reason to believe -- based on the rate of digital equipment penetration at this

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<sup>6/</sup> As of June 1999, nationwide cable penetration stood at 69.4 percent. See *Sixth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978 at ¶ 20 (2000).



time -- that off-air digital reception will come anywhere close to offsetting analog population service losses in the near future. 7/

Ultimately, the cost of such a significant loss of viewership, especially in the fiercely competitive television marketplace, may very well determine whether station operations remain economically viable. The simple fact is that, in the normal course of business, no rational broadcaster would volunteer to abandon its over-the-air operations and become a local cable-only service for an indeterminate period. The loss of over-the-air operations not only diminishes the advertising revenue the station will receive, it also adversely affects USAB's negotiating leverage in obtaining programming, such as local sports, which benefits from having as wide a potential audience as possible.

Although guaranteed cable carriage of digital signals for television broadcasters that voluntarily vacate channels in the 59-69 band is no panacea -- it would not, for example, prevent losses of up to one-third or more of the service area population in the case of USAB's stations -- there is an obvious and critical need for such guaranteed carriage. A decision by the Commission to apply a mandatory carriage regime to digital for stations that volunteer to cease analog operations would not compensate these stations for the substantial service losses they will inevitably face; but it will provide those stations with a more certain opportunity to build their digital broadcast business.

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7/ According to a recent survey conducted at the National Association of Broadcasters 2000 convention by KPMG Consulting's Digital Media Institute, of those asked when they believed DTV receivers would be in 25% of U.S. households, 33% of respondents said by 2002, 28% said 2003, 29% said 2005 and 10% said 2010. See *Broadcasting and Cable*, June 26, 2000 at 50.

In order to facilitate the clearance of the 700 MHz band, USAB urges the Commission promptly to adopt rules that will afford mandatory carriage rights for the entire 6 MHz of digital spectrum -- including high definition programming, interactive television, or whatever other services may be offered over the digital channel. This would enable those stations that agree to forego continued analog operations in order to promote the Commission's goal of early clearance of the 700 MHz band to fulfill Congress' – and the Commission's – goal of transitioning quickly to business models provided by digital operations.

### **III. USAB COULD SUPPORT VOLUNTARY BAND CLEARING MECHANISMS**

Notwithstanding the significant costs of early migration described above, USAB does not oppose the efforts of the Commission to create an environment in which the relevant parties are allowed to arrive at voluntary agreements that facilitate the Commission's goal of early band clearance. Accordingly, USAB believes that the same presumptions and policies adopted in the MO&O designed to encourage voluntary bilateral agreements between incumbent Channel 59-69 broadcasters and new 700 MHz wireless licensees 8/ should apply to any voluntary agreement that results in early clearance of the 700 MHz band, whether such an agreement is the result of a voluntary “secondary” auction or involves multiple broadcasters and multiple wireless licensees.

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8/ In the MO&O, the Commission established guidelines under which certain voluntary bilateral agreements between incumbent Channel 59-69 broadcasters and prospective 700 MHz wireless licensees would be afforded a rebuttable presumption that they would serve the public interest. See MO&O at ¶¶ 60-62.

Although USAB would not oppose the voluntary use of certain mechanisms – including secondary auctions – that would facilitate early band clearance, USAB *would be* opposed to any efforts by the Commission to mandate band clearance by incumbent UHF broadcasters. Given Congress' clear intention to preserve existing analog television service until the end of the DTV transition, any effort by the Commission to mandate clearance of the 700 MHz spectrum by forcibly relocating incumbent broadcasters – or mandating participation in any part of the band clearing process – is inconsistent with other Commission policies, contrary to Congressional directive, and would undoubtedly lead to protracted litigation and thus frustrate the Commission's goal of expedited band clearance. 9/

It should be noted that the Commission itself lacks statutory authority to either mandate or conduct such an auction. The Commission's auction authority stems from Section 309(j) of the Communications Act, which specifies that such authority is limited to the grant of "initial license[s] or construction permit[s]" that resolve mutually exclusive applications. 10/ Additionally, the Commission is limited to conducting auctions that raise funds to be deposited in the United States Treasury. 11/ Because secondary auctions as described in the FNPRM would involve bidding on contractual options, not "initial" licenses as specified in the Act, and because any proceeds from a secondary auction would go to incumbent Channel 59-69 licensees rather than to the

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9/ We note that three Commissioners already have expressed their opposition to any mandatory relocation of incumbent broadcasters. See FNPRM, Separate Statements of Commissioners Ness, Furchtgott-Roth and Tristani.

10/ See 47 U.S.C. 309(j)(1).

11/ See 47 U.S.C. 309(j)(8).

United States Treasury, USAB believes that the Commission is prohibited from conducting or requiring participation in secondary auctions.

It also should be noted that some of the mechanisms discussed in these proceedings, particularly secondary auctions that propose to incorporate a "slot-clearing" component, raise a number of technical and practical problems. Under these proposals, analog television operations could be relocated to digital allotments and digital allotments could be relocated to analog allotments. These proposals are premised on the assumption that digital and analog channels are readily interchangeable. The assumption, however, ignores the engineering and economics that underlie the Commission's television allotment system.

For example, moving a DTV station to an analog channel (and vice versa) is possible only in some instances, because it will generally upset (*i.e.*, cause interference) the DTV Table of Allotments. This interference would wreak havoc on the Commission's elaborate DTV allotment plan and further delay the digital television transition process. Further, the coverage area of different stations is bound to be different. Thus, the inherent economic value of the different stations likewise is bound to be different. In short, the proposed three-way relocation plans will prove technically challenging, enormously expensive and economically irrational because television stations and allocations are not fungible.

Nevertheless, USAB would be open to certain voluntary mechanisms -- so long as use of these mechanisms is left to the discretion of the parties. We note that no

700 MHz potential bidders have approached USAB to initiate discussions, although one intermediary has approached USAB for initial discussions. 12/

#### **IV. THE COMMISSION SHOULD PROMOTE CERTAINTY FOR BROADCASTERS TO ENABLE THEM TO MAKE AN INFORMED DECISION CONCERNING THE COSTS OF VACATING THEIR SPECTRUM**

Another step the Commission must take to facilitate band clearing is to reduce incumbent broadcasters' uncertainty regarding the costs involved in ceasing analog Channel 59-69 operations. Much of this uncertainty stems from the Commission's delay in addressing digital must-carry issues and the uncertainty of the regulatory processes associated with the Commission's approval of band clearing agreements and conversion to operation outside the 700 MHz band.

The risks faced by television broadcasters vacating their spectrum, described above, are exacerbated by the lack of certainty in many areas within the Commission's jurisdiction, such as (1) the timing of the 700 MHz auction, which already has been twice delayed; (2) the level of the must-carry rights to which broadcasters will be entitled on their digital channel if they cease analog operations; and (3) the length of time the Commission will take to act on pending DTV applications that are necessary to permit these broadcasters to commence operations on a new channel.

USAB urges the Commission to take the following steps in order to address and eliminate these uncertainties:

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12/ The Commission has already stated in the MO&O, and USAB agrees, that "private parties generally are the best evaluators of their own economic circumstances and alternatives." MO&O at ¶ 58.

First, the Commission should make a commitment to hold firm on the current March 6, 2001 date for the 700 MHz auction. By establishing a date certain for the auction, the Commission will encourage broadcasters and potential wireless bidders to commence negotiations and put spectrum clearing plans in place. On the other hand, if the parties believe that the auction date is subject to indefinite deferral, there is little incentive to engage in serious negotiations.

Second, the Commission should clarify that the digital signals of, at least, stations vacating their analog channels for band-clearing purposes will be entitled to full must-carry rights (i.e., mandatory carriage of all digital transmission) for the entire bitstream associated with their 6 MHz digital signal. The Commission should assure broadcasters that they will be able to take full advantage of the panoply of both current and future technological possibilities that digital operations affords. <sup>13/</sup> Without clarification that such must-carry rights will be available, it is difficult to see how any rational broadcaster would willingly abandon its analog channels in advance of the market.

Third, the Commission should afford processing preference with respect to any pending digital applications to broadcasters vacating their analog channels. USAB urges the Commission to establish a 60-day processing timeline for these applications in order to ensure that broadcasters would be able to transition seamlessly to digital facilities at the time of their early surrender of their analog channels. Such expedited processing would cover DTV construction permit applications, allotment changes, STAs

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<sup>13/</sup> As noted above, these would include high definition programming, interactive television, or whatever other services may be offered over the digital channel.

and all subsequent applications or amendments filed by such licensees to implement their relocation from the analog channel to a new digital channel.

**V. USAB SUPPORTS THE COMMISSION'S TENTATIVE CONCLUSION THAT COST-SHARING RULES ARE UNNECESSARY**

The Commission also sought comment on whether it should implement cost-sharing rules whereby any post-auction 700 MHz licensees that would benefit from a given incumbent broadcaster's expedited clearance of the band would be required to share in the payment to the broadcaster. However, the Commission tentatively concluded that cost-sharing rules would not be necessary or appropriate.

By way of background, each new 700 MHz license will authorize operation in one of six large geographic areas (Economic Area Grouping or "EAG"). In each EAG, the FCC will auction off two Blocks of spectrum (Block C is a 10 MHz band of spectrum that is now occupied by television Channels 60 and 65; Block D is a 20 MHz band of spectrum that is now occupied by Channels 61-62 and 66-67). Accordingly, if a new Block D 700 MHz licensee in a given EAG is successful in negotiating with an incumbent Channel 61 TV licensee operating within its EAG, the early clearance by the broadcast incumbent will potentially benefit other new 700 MHz licensees. For example, early clearance may benefit the new Block C 700 MHz licensee, in that the Block C licensee (who occupies what was television Channel 60) is required to provide first adjacent protection to the Channel 61 television incumbent. Additionally, if the Grade B contour of the Channel 61 television incumbent crosses over into an adjacent EAG, the Block D 700 MHz licensee in that EAG would receive a benefit as a result of the negotiated early clearance.

USAB believes that calculating the pro rata value of early clearance by a given television incumbent would be inordinately complex and would result in delay of the spectrum clearing process. Although the number of new 700 MHz licensees that benefit significantly from any particular clearing agreement will be small, the pro rata value to each licensee will be difficult to calculate. Even if the FCC were to develop a scheme for such a calculus, the Commission would then be left with the task of resolving the inevitable disputes that will arise. These disputes will, in turn, lead to delay in clearance of the 700 MHz band.

Although USAB supports the Commission in its tentative conclusion that cost-sharing rules would not be appropriate -- and, in fact, may even result in delaying spectrum clearance -- USAB is confident that to the extent cost-sharing is an economically rational option, which would result in expedited deployment of new wireless services, the new 700 MHz licensees will likely enter into cost-sharing agreements without Commission rules. USAB notes that, at most, there will only be twelve 700 MHz auction winners, with a likelihood that there will be even fewer. Additionally, the auction winners will likely be sophisticated operators who will be motivated to reach mutual agreements that will lead to swift deployment of their new services.

## **VI. CONCLUSION**

For the foregoing reasons, USAB believes that the Commission should:

(1) provide incumbent broadcasters and new wireless licensees broad flexibility to enter into voluntary, market-based spectrum clearing arrangements and reject any mandatory



proposals for participation in the band clearing process; (2) clearly set and keep to expedited timetables for its administrative activities, from holding the auction to processing any necessary applications, including DTV applications; and (3) clearly and promptly address critical uncertainties that are slowing the digital transition, such as digital must-carry.

Respectfully submitted,

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